

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

JOHN C. CUNNINGHAM

Claimant

VS.

LOVE BOX COMPANY, INC.

Self-Insured Respondent

Docket No. 1,029,678

ORDER

STATEMENT OF THE CASE

Both respondent and claimant requested review of the January 9, 2009, Award entered by Administrative Law Judge John D. Clark. The ALJ found that claimant was entitled to a 50 percent work disability. The Board heard oral argument on April 17, 2009. In its order of May 7, 2009, the Board found that claimant failed to make a good faith effort to find post-injury employment and imputed a post-injury wage of \$330. The Board affirmed the ALJ's finding that claimant had a 0 percent task loss. Accordingly, the Board lowered claimant's work disability to 22 percent.

Claimant appealed the Board's order to the Kansas Court of Appeals. On June 18, 2010, the court entered a Memorandum Opinion reversing the Board's Order and remanding the matter to the Board to determine claimant's wage loss without consideration of his good faith effort to find post-injury employment, citing *Bergstrom*.¹ The Court of Appeals affirmed the Board's finding that claimant had a 0 percent task loss. The parties were informed that this case would be decided by the Board on their briefs unless oral argument was requested. Neither party requested oral argument to the Board.

Jim Lawing, of Wichita, Kansas, appeared for claimant. Gary K. Jones, of Wichita, Kansas, appeared for respondent.

¹ *Bergstrom v. Spears Manufacturing Co.*, 289 Kan. 605, 214 P.3d 676 (2009). *Bergstrom* was filed on September 4, 2009, four months after the Board's Order was entered in this case.

The Board has considered the record and adopted the stipulations listed in the Award.²

ISSUES

Claimant asks that the Board enter an order finding that claimant's injury resulted in a 50 percent work disability.

Respondent requests the Board to determine claimant's wage loss and find that claimant has a work disability of no more than 50 percent.

The issue for the Board's review is: What is claimant's percentage of wage loss?

FINDINGS OF FACT

Claimant's last day of full-time employment was on April 4, 2005. From June 20 through June 26, 2005, he went back to work for respondent for 2 hours a day. There was no evidence of how much claimant earned during the period from June 20, 2005, through June 26, 2005. He has not worked since June 26, 2005.

PRINCIPLES OF LAW

K.S.A. 44-510e states in part:

Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

² Acting Director Seth Valerius appointed E.L. Lee Kinch to serve as Appeals Board Member Pro Tem in place of retired Board Member Carol Foreman.

In *Foulk*,³ the Kansas Court of Appeals concluded that K.S.A. 1988 Supp. 44-510e(a) implicitly contained a requirement that an injured worker must exercise good faith in an attempt to mitigate their lost wages. In *Copeland*,⁴ the Court of Appeals stated:

If a finding is made that a good faith effort has not been made, the factfinder will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages.

In *Bergstrom*, however, the Kansas Supreme Court stated:

We can find nothing in the language of K.S.A. 44-510e(a) that requires an injured worker to make a good-faith effort to seek out and accept alternate employment. The legislature expressly directed a physician to look to the tasks that the employee performed during the 15-year period preceding the accident and reach an opinion of the percentage that can still be performed. That percentage is averaged together with the difference between the wages the worker was earning at the time of the injury and the wages the worker was earning after the injury. The legislature then placed a limitation on permanent partial general disability compensation when the employee “is *engaging* in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.” (Emphasis added.) K.S.A. 44-510e(a). The legislature did not state that the employee is required to *attempt to work* or that the employee *is capable of engaging in work* for wages equal to 90% or more of the preinjury average gross weekly wage.⁵

ANALYSIS

The Court of Appeals reversed the Board’s determination that claimant’s failure to make a good faith effort to find employment after his injury resulted in a reduction of his actual 100 percent wage loss to a 44 percent wage loss based upon his ability to earn wages post injury. The Court of Appeals said:

Without consideration of the good-faith requirement, the wage loss component of permanent work disability is a simple calculation: “[T]he difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.” K.S.A. 44-510e(a). Accordingly, applying *Bergstrom*, the Board erred in reducing

³ *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 284, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

⁴ *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 320, 944 P.2d 179 (1997).

⁵ *Bergstrom*, 289 Kan. at 609-10.

Cunningham's award because he failed to prove he made a good-faith effort to find appropriate postinjury employment.⁶

The Court of Appeals affirmed the Board's finding that claimant failed to prove a task loss. Therefore, claimant's task loss percentage is zero for purposes of the two-pronged work disability formula in K.S.A. 44-510e(a). With respect to wage loss, however, the Court of Appeals remanded this case to the Board with instructions "to the Board for a wage loss determination without consideration of a good-faith effort to find appropriate postinjury employment."⁷ During the time claimant was unemployed, he was not earning any wages. This results in a wage loss of 100 percent. Averaging claimant's 100 percent wage loss and his 0 percent task loss results in a work disability of 50 percent. The ALJ's award calculation ordered the payment of disability compensation to commence on the day following the accident date of March 29, 2005, and provided for permanent partial disability compensation to begin immediately following the payment of the 56.26 weeks of temporary total disability compensation.

Claimant performed work for wages from the date of accident until April 4, 2005. Claimant also worked part time from June 20, 2005, through June 26, 2005. There is no evidence of what claimant earned during those periods. Therefore, for those time periods, claimant has failed to prove his wage loss. Therefore, claimant's permanent partial disability is limited to his percentage of functional impairment. Nevertheless, because of the short duration of this post-injury work, claimant's 20 percent functional impairment would cover the time he worked, and it makes no difference in the award calculation. Therefore, the ALJ's calculation of the award will be reinstated and affirmed.

CONCLUSION

After June 26, 2005, claimant's wage loss is 100 percent for purposes of computing his permanent partial disability under K.S.A. 44-510e.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge John D. Clark dated January 9, 2009, is affirmed.

IT IS SO ORDERED.

⁶ *Cunningham v. Love Box Company, Inc.*, No. 102,538, Court of Appeals unpublished opinion filed June 18, 2010, slip. op. at 4.

⁷ *Id.*, slip. op. at 6.

Dated this _____ day of November, 2010.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Jim Lawing, Attorney for Claimant
Gary K. Jones, Attorney for Self-Insured Respondent
John D. Clark, Administrative Law Judge